BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TONNIE J. FACKRELL, Claimant, v. SOUTHERN IDAHO REGIONAL LABORATORY, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 04-500474** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: July 17, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on October 13, 2005. Bryan Scott Storer of Boise represented Claimant. Max M. Sheils, Jr., also of Boise, represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on June 5, 2006, and is now ready for decision.

ISSUES

As set out at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical care;

b. Disability in excess of impairment; and

c. Attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts that as a result of her industrial accident and injury of January 2, 2004, she has sustained disability of 22% in excess of her 2% permanent partial impairment; that she is entitled to additional medical care; and that she is entitled to an award of attorney fees because Defendants refused to accept her claim for disability in excess of impairment.

Defendants contend that Claimant failed to carry her burden of proving that she is in need of additional medical care, and Defendants are not responsible for reimbursing medical care sought by Claimant outside the chain of referral. Defendants further assert that Claimant is not entitled to disability in excess of impairment because Employer offered Claimant work that was within her restrictions for the same number of hours and the same pay she was receiving at the time of her injury, which Claimant declined. Claimant has made no serious attempt to seek other work. Even if Claimant is found to be entitled to disability in excess of impairment, such disability is less than 2%, not the 22% claimed by Claimant. Finally, Defendants assert that their denial of benefits to which Claimant is not entitled cannot provide the basis of a claim for attorney fees pursuant to Idaho Code § 72-804.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Samuel Mitchell, D.C., Debra Ross and Brenda Shepherd taken at hearing;

2. Claimant's Exhibits 1 and 2, admitted at hearing;

3. Defendants' Exhibits 1 through 11 admitted at hearing; and

4. The post-hearing deposition of Christian Gussner, M.D..

Claimant took the post-hearing deposition of James H. Bates, M.D., but no deposition transcript was filed with the Commission. When the case came under advisement and it was discovered that there was no transcript of the scheduled post-hearing deposition, Commission staff made a courtesy call to Claimant's counsel regarding the missing transcript. On June 14, 2006, a copy (not certified) of Dr. Bates' deposition transcript was received at the Commission. However, based on statements contained in Defendants' brief, it does not appear that the deposition transcript was provided to Defendants prior to briefing. Because Defendants did not have the transcript available at the time the case was being briefed, the post-hearing deposition of Dr. Bates is excluded, and references to the deposition contained in Claimant's brief are disregarded.

Defendants took the pre-hearing deposition of Tim Hansen, an agent of Employer. Though a copy of the deposition was handed to the Referee at the outset of the hearing, the deposition was not included in Defendants' Rule 10 disclosure, and was never offered into evidence or admitted as part of the record in this proceeding. References to Mr. Hansen's deposition contained in Defendants' brief are disregarded.

After having considered the evidence identified in items one through four, above, and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

THE CLAIMANT

1. At the time of hearing, Claimant was 37 years of age, married, and the mother of four children, the youngest of whom were four and two. Claimant's husband, Tony Fackrell,

was on active duty with the Idaho National Guard beginning in June 2004 and at the time of the hearing was deployed in Iraq.

2. Claimant graduated from Borah High School in 1986. She was a poor to average student. After high school, Claimant attended the Meridian School of Beauty to become licensed as a manicurist. The record is silent as to whether Claimant ever worked as a manicurist.

3. Claimant attended the American Institute of Health Technology from September 1992 through November 1993. She graduated with a certificate as a medical assistant and a separate certification as a phlebotomist.

4. Prior to her graduation from the American Institute of Health Technology, she went to work for Family Practice Medical Center as a switchboard operator. Thereafter, Claimant worked for several employers as a receptionist. Her work was primarily part-time.

THE JOB

5. In October 2000, Brenda Shepherd hired Claimant to work as a phlebotomist for Employer. Ms. Shepherd is the phlebotomy supervisor for Employer's Boise facility. Ms. Shepherd's husband and Claimant's husband served together in the National Guard, and their association was an important factor in Ms. Shepherd's decision to hire Claimant. Ms. Shepherd considered her association with Claimant went beyond their supervisor/subordinate relationship and became friendship.

6. Claimant worked twenty hours per week for Employer, starting work at 4:00 a.m. and usually leaving by 8:00 a.m. This arrangement worked well for Claimant as she was back home before her husband left for work, and she could be with her pre-school children during the day. At the time of her injury, she was making $11.65 per hour.

7. The type of work that Claimant performed for Employer involved visiting three

long-term care facilities each day to perform blood draws from residents in the facility. The total number of draws Claimant was required to perform would vary from day to day, from as few as three to as many as twenty. Most of the patients from whom she was required to draw blood were bedridden, and, on occasion, uncooperative. If a phlebotomist needed assistance with an unruly patient or a patient who needed to be repositioned, she was supposed to call on the nursing staff of the facility for assistance. Claimant generally did not seek assistance from the nursing staff because " . . . most of the time they're busy and they say just get the blood and so you do your best, whatever you have to do to get those tests because they need their tests . . . ." Tr., p. 19.

8. Following the January 2 accident, Claimant was off work until April 29, when she returned to work for one hour per day. This was increased to two hours per day at the end of May. After Claimant returned to work in April, and while she was working reduced hours, Employer, through Brenda Shepherd, made Claimant an offer of an alternative job that would not have required Claimant to visit nursing homes and draw blood. The job would have entailed office work for the same number of hours and for the same pay that Claimant received working as a phlebotomist. Claimant neither accepted nor rejected the offered position, and in August 2004 she submitted her resignation. Her last day of work was August 27, 2004.

THE ACCIDENT

9. On January 2, 2004, Claimant arrived at Hillcrest nursing home on her first stop of the day. There was a light dusting of snow on the parking lot. While exiting her Ford Expedition, Claimant slipped and fell, landing on her back. On her way to the ground, she struck her back just below her right scapula, landed on her right hip and bumped her head. Her right ankle was also injured. She filled out an accident report at Hillcrest, finished her work for the

day, and returned to her workplace where she reported the accident to Debra Ross, business manager. Ms. Ross immediately sent Claimant to Occupational Medicine Associates.

MEDICAL RECORDS

Occupational Medicine Associates

10. At Occupational Medicine Associates (OMA), Claimant saw Michael P. Gibson, M.D. She reported pain on the right side of her neck and the right scapular area, and discomfort in the right hip and lateral aspect of her right ankle. On exam, Dr. Gibson noted some tenderness in the T7 area of Claimant's thoracic spine. Range of motion in her neck, hip, ankle and lumbar spine were normal with some tenderness noted on the lateral aspect of the right ankle. Dr. Gibson diagnosed "strains and contusions of the right cervical and thoracic spines, right hip and ankle areas." He prescribed an anti-inflammatory and a muscle relaxant, recommended she apply ice to the affected areas and return for follow up on Monday, January 5. He released her to work with no restrictions.

11. Claimant returned to OMA on January 5, 12, and 19. On January 5, she reported that, "it was too painful to go to work today." Defendants' Ex. 3, p. 46. Claimant's ankle complaints had resolved by January 5, but she reported continuing pain in her neck and mid-thoracic region and reported low back pain for the first time. Dr. Gibson's diagnosis was cervical, thoracic and lumbar strain. Claimant was given orders for physical therapy daily for a week, then three times a week for two more weeks. On January 5, relevant restrictions included a ten-pound lifting restriction, no repetitive twisting, bending or stooping, and alternate standing, sitting and walking. Claimant did not return to work. On all three visits, her range of motion was normal in her cervical, thoracic, and lumbar spine, and she had no signs of radiculopathy or other neurological findings. It was noted that Claimant reported falling on her right side, but

most of her pain complaints were on the left side. By January 19, Claimant noted some improvement in the upper thoracic area, but continued to complain about her neck and low back.

12. On January 21, Claimant presented at OMA with a sudden onset of sharp pain starting in her low back and moving up to her mid-thoracic spine. With the exception of mild facet joint tenderness in the vicinity of T8, her exam was essentially unchanged from her previous visits with no range-of-motion deficits, neurological findings, or radiculopathy. Claimant was advised to continue with the physical therapy that had been scheduled.

13. Claimant returned to OMA on January 27. She reported that the pain in her upper back was significantly better, but that her low back pain had not improved. Claimant reported that she could not work because of the low back pain and that Employer had not honored her restrictions. Dr. Gibson noted:

> She has a remarkably good examination. She can touch her toes without difficulty. Extension and rotation and lateral movement are good. She has complaints of pain to palpation of the paralumbar musculature, but no spasm is noted. Straight-leg raising, DTR's [sic], strength, and sensation are normal. The neck exam is benign, as documented.

Defendants' Ex. 3, p. 58. Dr. Gibson ordered lumbosacral x-rays which were read as showing normal alignment and small anterior end plate osteophytes at L2-3, L3-4, and L4-5 consistent with early degenerative changes. Dr. Gibson summarized his diagnosis:

> Persistent low back pain since the injury without improvement over a months [sic] time. Inability to return to her normal activities, but a surprisingly good functional examination.

Id. At a loss to explain her continuing low back complaints, Dr. Gibson referred Claimant to Kevin R. Krafft, M.D., a physiatrist.

Dr. Krafft

14. Claimant saw Dr. Krafft on February 11. She reported "a burning sensation in her

low back region, radiating into her left buttocks region." Defendants' Ex. 5, p. 79. Claimant also reported:

> . . . increase of pain with bending, standing, walking, picking up toys off the ground, sitting at church for any period of time, and with childcare activities. She is no longer able to walk, shop, work, sled or go to the gym as a result of her discomfort. She is unable to sit, stand or walk for very long. . . . She reports significant vegetative signs and symptoms including lack of energy and dysthymic complaints.

Id. Findings on exam were essentially normal with no deficits in range of motion, motor strength, sensation or reflexes. Dr. Krafft recommended stepping up Claimant's physical therapy for three weeks with additional stretching exercises and transitioning into a home exercise program. He authorized her return to work with a 50-pound lifting restriction and no bending, twisting or stooping. Claimant did not return to work. Later that month, Dr. Krafft authorized Claimant to see her chiropractor, Dr. Coulter.

15. Claimant returned to Dr. Krafft on March 8. She was continuing with physical therapy and believed she had improved her strength. She did report an onset of low back pain when she shopped and prepared a big meal for the family; she admitted that she was also lifting her children, which Dr. Krafft believed was contributing to her low back complaints. On exam her motor strength, sensation and reflexes were normal. Dr. Krafft discussed getting a job site evaluation (JSE), but in the meantime he restricted lifting to 35 pounds with no bending, twisting or stooping. He stressed that these restrictions applied at home as well. Claimant continued off work.

16. When she returned to Dr. Krafft on March 29, Claimant reported that she had stopped physical therapy and was seeing Dr. Coulter three times per week. Dr. Krafft asked her to continue with the physical therapy, and hoped to have the JSE by the time of her next appointment scheduled for April 27.

17. In early April, Ken Halcomb, rehabilitation consultant with the Industrial Commission Rehabilitation Division (ICRD), conducted a JSE for Claimant's time of injury position. The JSE was prepared in consultation with Brenda Shepherd and Claimant. Relevant information from the JSE includes:

- Combined standing and walking—4 hours/day;
- Maximum combined standing and walking—1.5 hours/day (per Shepherd), 2.5 hours/day (per Claimant);
- Lifting in excess of 20 pounds—not required;
- Lifting up to 20 pounds—frequently;
- Climbing, kneeling, crouching—occasionally;
- Bending/stooping, twisting—frequently;
- Reaching above shoulder and operating foot controls—occasionally;
- Reaching at shoulder height or below, fine manipulation and fingering, and pushing/pulling—frequently;
- Grasping/handling—continuously.

18. At her April 27 appointment with Dr. Krafft, Claimant reported she was doing well—some days she was good and some days her low back symptoms would flare. She was walking on a treadmill approximately two miles per day, bicycling, and using weights for upper-body work. She was seeing Dr. Coulter once a week and reported no radicular or neurological symptoms. Dr. Krafft initiated a return-to-work program, starting at one hour per day for three weeks with no bending, twisting or stooping while standing, a twenty-pound lifting restriction, and *ad lib* positional changes. Claimant returned to work on April 29. She worked nine days for a total of twelve-and-a-half hours.

19. Claimant returned to Dr. Krafft on May 17, reporting worsening pain and pain radiating from her back into her left buttock. She told Dr. Krafft that she was unable to utilize adaptive techniques to perform blood draws, and that she received little help in positioning patients. Dr. Krafft suggested that Claimant should try to do some of her blood draws from a seated position. Despite her complaints, she admitted that some days she did well. On exam, she exhibited some tenderness in the left low back paraspinals. Motor strength, sensation and reflexes were intact and normal. Although he doubted that Claimant had significant back pathology, Dr. Krafft ordered an MRI at Claimant's insistence. He opined that if the MRI were negative, Claimant should be placed in a work-hardening program.

20. Claimant underwent an MRI of her lumbar spine May 18. The MRI showed minimal left side facet osteophytes at L2-3 and L3-4, consistent with early osteoarthritic changes. There was no evidence of disc herniation, stenosis or neural foraminal narrowing at these levels. At L5-S1, there was a small right lateral to far right-lateral disc protrusion with disc material extending into the right L5-S1 neural foramen. The exiting right L5 nerve root was not compromised. There was no evidence of stenosis or foraminal narrowing at L5-S1.

21. Claimant returned to Dr. Krafft on May 26. Dr. Krafft characterized Claimant's MRI as "completely normal." Defendants' Ex. 5, p. 98. Claimant was walking in excess of a mile every day, but could not do more without discomfort. She reported that she was pain free unless she bends, and just could not find a way to access her patients for blood draws without bending. On exam, her motor strength, sensation and reflexes were intact and normal. Dr. Krafft recommended that Claimant start a work-hardening program as soon as her husband deployed in late June or early July. In the meantime, Dr. Krafft increased Claimant's daily work limit to two hours and recommended that she pursue the neuropsychological portion of the

program qualifications, and get some physical therapy.

22. Claimant worked for a total of 35 hours over 15 days between May 31 and June 23. When Claimant saw Dr. Krafft on June 23, she reported that her condition was unchanged. She had not been exercising because it increased her pain. On a recent family vacation, she complained that she could not walk with the family, but had to sit and wait for them. Dr. Krafft agreed to delay Claimant's work-hardening program until after her husband had been deployed:

> Multiple psychosocial issues. Her husband is about to deploy to Iraq, which has thrown the family into significant stress. She does not feel that she can start this next Monday, as he is reporting to Gowen Field on Monday and then deploying on the 1st, and she needs to be available during that week to see him at any time that they call.

Id., at p. 99. No changes were made to her work restrictions. This was evidently Claimant's last visit to Dr. Krafft.

Work Hardening

23. Claimant contacted Peggy Bailey, PT, at St. Alphonsus Rehabilitation Services (STARS) on June 24 regarding the work hardening program. She asked that her evaluations scheduled for June 28 and 29 be rescheduled until July 6 because of her husband's impending deployment. On June 29, Claimant again contacted Peggy Bailey expressing concern that she could not attend work hardening for eight hours a day, work, and care for her four children without her husband. Ms. Bailey clarified that the work hardening program started at two hours per day and did not exceed four hours per day. Claimant confirmed that she would be able to attend both appointments scheduled for her on July 6—an initial physical therapy evaluation and a neuropsychological evaluation conducted by Dr. Calhoun.

24. Claimant appeared for her physical therapy evaluation on July 6. She tolerated the testing well, reporting slightly increased low back pain during the testing, but reduced pain at

the conclusion of the testing. Ms. Bailey concluded that Claimant was a good candidate for the work-hardening program to include two to three hours per day for three to five days per week for three to four weeks. Claimant advised Ms. Bailey that on the advice of her counsel she would not attend her appointment with Dr. Calhoun for that afternoon, and would be unable to attend the work hardening program the following day. Claimant did not attend her appointment with Dr. Calhoun. Dr. Krafft contacted Claimant's counsel to discuss the work hardening program and Claimant's appointment with Dr. Krafft was rescheduled for July 13. Claimant was advised that attendance at the appointment was a necessary prerequisite to being admitted to the STARS program. Claimant did not appear for the July 13 appointment, and as a result, was not admitted as a participant in the STARS program. On July 19, Dr. Krafft telephoned Angela Harter, the adjustor on Claimant's claim and advised Ms. Harter that Claimant had rescheduled two appointments with him, and had no-showed at two appointments with Dr. Calhoun. In light of Claimant's decision not to participate in work hardening, Dr. Krafft suggested that an independent medical exam (IME) would be appropriate to obtain an impairment rating. Dr. Krafft also offered to do the impairment rating, but only if Claimant personally assured she would attend an appointment with Dr. Krafft.

Dr. Sam Mitchell

25. On June 4, while she was still treating with Dr. Krafft, Claimant started receiving treatment from Sam Mitchell, a chiropractor and her brother-in-law. There is nothing in Dr. Krafft's records to indicate that he was aware Claimant had stopped seeing Dr. Coulter and started seeing Dr. Mitchell, no authorizing referral, and no request to Surety to approve treatment by Dr. Mitchell.

26. Between June 4, 2004 and September 20, 2005, Claimant saw Dr. Mitchell

seventy-six times. Treatments were not limited to Claimant's low back, but also included her groin, right upper extremity, mid back, and neck.

Dr. Christian Gussner

27. Dr. Gussner was retained by Defendants to perform an IME. Dr. Gussner is board certified in physical medicine and rehabilitation. He also has a certification in the sub-specialties of pain medicine and electrodiagnostic medicine. Claimant saw Dr. Gussner on August 18. Dr. Gussner's report is of even date. Dr. Mitchell accompanied Claimant to the IME, where he was introduced to Dr. Gussner as Claimant's brother-in-law. No mention was made of the fact that Dr. Mitchell was a chiropractor, and was treating Claimant at the time.

28. Dr. Gussner reviewed the medical records from OMA, Dr. Krafft (including the MRI results), and the STARS program. He took Claimant's history and conducted an exam. Dr. Gussner found Claimant to be a reliable historian; the information she provided was consistent with the medical reports. Dr. Gussner inquired regarding the history of her current injury, her occupational history, her social history, and her medical and surgical history.

29. Dr. Gussner's exam focused on Claimant's lumbar and cervical spine. He observed that the Claimant appeared comfortable, sat quietly for twenty-five minutes, and exhibited no significant pain behavior. Dr. Gussner found no abnormalities in Claimant's cervical spine. Her posture was good, she exhibited no tenderness on palpation and her cervical range of motion was symmetric bilaterally and within normal limits. Similarly, range of motion in the lumbar spine was normal without pain. Claimant was mildly tender to palpation in the left lower lumbar paraspinal muscles, left upper gluteal region and left sciatic notch. Straight-leg raise was normal bilaterally, with mild left low backache, but no radiation of pain to the lower extremities. Claimant's neurological exam was entirely normal.

30. Dr. Gussner had Claimant complete a pain status inventory, an Oswestry Function Test, and a depression questionnaire. The tests indicated that Claimant likely suffered from a mild mood disturbance, perceived herself as moderately disabled, and showed no indication of symptom magnification.

31. Dr. Gussner concluded: Claimant had sustained a cervical, thoracic and lumbar strain that was causally related to her January 2, 2004 work accident; she had asymptomatic pre-existing lumbar degenerative arthritis that was aggravated by the work accident; she had multiple psychosocial stressors not related to the work injury that seemed to be exacerbating her pain complaints and her perceived disability; and she had complaints of chronic left lumbar and gluteal pain of unknown etiology that could not be correlated with the small right lateral L5-S1 disc protrusion.

32. Dr. Gussner concluded that given Claimant's refusal to participate in a work-hardening program, she was at maximum medical improvement, and needed no additional treatment or medications. He recommended permanent medium-duty activity restrictions based on her pre-existing degenerative arthritic condition consisting of maximum occasional lifting of fifty pounds, repetitive lifting of twenty-five pounds, avoidance of continuous bending, twisting, lifting or torquing activities, avoidance of low frequency vibration or jarring activities, and that she needed *ad lib* positional changes.

33. Dr. Gussner opined that Claimant's time of injury job was well within the permanent restrictions he imposed, and that her desire to remain at home with her children was the primary reason she did not return to her time of injury position. Finally, he gave her a permanent partial impairment rating (PPI) of 5% of the whole person based on a DRE Lumbar Category II, Table 15-3, p. 384 of the *Guides to the Evaluation of Permanent Impairment,* 5th Ed.

(*Guides).* Dr. Gussner apportioned 3% of the PPI to Claimant's work related injury of January 2, 2004, and the remaining 2% to her pre-existing degenerative arthritis.

Dr. James Bates

34. On August 30, 2004, Claimant saw Dr. Bates. It is not clear from the record how Claimant came to see Dr. Bates or what his particular qualifications might be. Such information is probably contained in his deposition, which is not a part of the record in this proceeding. The information in the chart note pertaining to Claimant's history is consistent with the information contained in the other medical records discussed herein. On the date of this first visit, her presenting systems included pain in the left gluteal region and down the posterior aspect of the left thigh and toward the lateral aspect of the thigh. On exam, Claimant's posture and gait were normal, range of motion of cervical spine was within normal limits. Range of motion of the lumbar spine was mildly restricted in forward bending and extension but normal otherwise. Claimant exhibited no tenderness in the spinous processes of the lumbar spine. Motor strength, sensation and reflexes were normal. Dr. Bates diagnosed "back pain with mechanical evaluation of a posterior derangement." Defendants' Ex 1, p. 3.

35. Claimant returned to Dr. Bates on September 2. She reported that she was doing the "positioning" that he had recommended without significant change. Upon further inquiry, Claimant reported less pain in the lateral and lower thigh. Straight-leg raise was negative and Claimant exhibited no significant restriction in flexion or extension. Dr. Bates recommended additional physical therapy to "progress the positioning and to advance stabilization and strengthening with the extension-bias in the plan." *Id.,* at p. 4.

36. On October 4, Claimant returned to Dr. Bates. She reported that she was "doing pretty good." *Id.,* at p. 6. She had not been to physical therapy for a couple of weeks, but was

doing exercises on her own. She reported only one instance of radicular pain in her left lower extremity. Dr. Bates continued her physical therapy as authorized.

37. Claimant did not return to Dr. Bates again until April 27, 2005. She reported that she was doing quite well, and had improved since the last visit, having more good days than bad days. Radicular symptoms had resolved, leaving residual low back and buttock pain when exacerbated. Claimant had not returned to physical therapy as discussed in October 2004 because of lack of insurance coverage for the treatment. Dr. Bates recommended four to six weeks of formal physical therapy for advanced lumbar strengthening, but conceded that it was not likely Claimant would be able to pursue this due to difficulty in obtaining authorization and the other stresses on-going in her life.

38. While Dr. Bates felt Claimant could benefit from additional treatment, he considered her to be at maximum medical improvement, and determined that she was a DRE lumbar category II with a 5% whole person impairment based on the *Guides*. He apportioned fifty percent of her impairment to her industrial injury, which he rounded up to 3% as the *Guides* do not allow for partial percentages. He imposed restrictions including lifting no more than 45 pounds rarely and no more than 35 pounds occasionally, and use of proper body mechanics. He opined that the restriction regarding proper body mechanics would preclude Claimant returning to her time of injury position.

VOCATIONAL EVIDENCE

39. Surety referred Claimant's case to ICRD in March 2004. Ken Halcomb, ICRD rehabilitation consultant, prepared a JSE and conducted an initial interview with Claimant. Thereafter, he obtained medical records and maintained regular contact with Claimant and Employer. The ICRD notes indicate that based on the JSE, Dr. Krafft allowed Claimant to return

to her time of injury position with limited hours in late April. In mid-July, after she had refused to participate in the work hardening program, Claimant told Mr. Halcomb that she was participating in the work-hardening program. In mid-August, Claimant advised Mr. Halcomb that she was resigning her position with Employer. About the same time, Mr. Halcomb received Dr. Gussner's IME report stating that Claimant could return to her time of injury position. There is nothing in the ICRD notes to indicate whether Employer offered Claimant an alternative position—Mr. Halcomb had no record of contact with Employer subsequent to preparing the JSE. Mr. Halcomb closed Claimant's file in September because Claimant returned to work at her time of injury position and then quit.

40. Claimant has not actively sought work since she resigned her position with Employer. At hearing she testified that she has made one telephone contact, filled out two job applications, and had one job interview.

41. Claimant retained Douglas Crum, C.D.M.S., to prepare a disability evaluation. Claimant did not dispute the 3% impairment rating that both Drs. Gussner and Bates awarded. Mr. Crum's report is dated September 1, 2005. A post-hearing deposition of Mr. Crum was scheduled but later vacated. Mr. Crum reviewed medical records from Dr. Bates and Dr. Gussner. He did not have records from OMA, Dr. Krafft, or from physical therapy and chiropractic providers. He reviewed the ICRD case notes, and met with Claimant.

42. Mr. Crum reviewed Claimant's wage history, her work history, and identified her transferable skills. He determined that her time of injury job was generally considered to be light work, with occasional need for medium work with uncooperative patients. Mr. Crum noted that Dr. Bates felt that Claimant could not return to her time of injury position. Mr. Crum did not discuss the opinions of her treating physician, Dr. Krafft, and the IME physician, Dr. Gussner,

both of whom opined that she could return to her time of injury position. Based on Dr. Bates's restrictions, Mr. Crum determined that before her injury, Claimant had access to 8% of the labor market. Following her injury, she had access to 6.2% of the labor market. Mr. Crum calculated that on a percentage basis, this represented a 23% loss of access to the labor market.

43. Mr. Crum opined that Claimant could expect to compete for jobs in her labor market with wages between $7.50 and $10.00 per hour. He calculated that this represented a 14% to 35% reduction in wage-earning capacity.

44. Mr. Crum concluded that Claimant sustained permanent partial disability of 24% of the whole person, inclusive of her impairment.

DISCUSSION AND FURTHER FINDINGS

MEDICAL CARE

45. The payment of medical benefits is contingent upon there being substantial competent evidence that the medical care sought is related to the industrial accident. This burden of proof rests on the claimant. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

46. Claimant seeks present and future medical care for her low back injury. She bases this request on the opinion of Dr. Bates, allegedly contained in his post-hearing deposition. As discussed at the outset of this decision, the deposition of Dr. Bates is not a part of the record in this proceeding.

Dr. Bates' medical records, which are part of the record, do recommend a four- to six-

week course of physical therapy to strengthen Claimant's lumbar spine. However, it is not clear whether this recommendation is a result of her pre-existing degenerative condition, or her industrial injury. Further, Dr. Bates is not in her chain of referral, nor does it appear that Surety authorized any treatment by Dr. Bates. His opinions carry no weight.

There is nothing in the record from any of Claimant's treating physicians or Dr. Gussner attributing Claimant's small right lateral L5-S1 disc bulge to her industrial accident. Dr. Bates' records may *imply* such a correlation, but without explanation as to how he reached that conclusion, the Referee will not *infer* such causation. So far as the record in this proceeding shows, Claimant sustained a lumbar strain as a result of her fall on January 2, 2004.

It is also important to note that Claimant was offered additional treatment, in the form of the STARS work hardening program, which she declined. She also declined further treatment from Dr. Krafft, which included physical therapy. Neither her treating physicians, nor the physician who performed the IME, opined that Claimant needed any other additional care beyond what had been offered and refused. The Referee finds that Claimant is not entitled to additional medical care at the present time. Whether Claimant may need medical care in the future as a result of the lumbar strain is mere speculation, and is not a sufficient basis for an award of future medical benefits. Neither is it a sufficient basis for this Commission to retain jurisdiction over this proceeding.

DISABILITY

47. A claimant also carries the burden of proving disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with non-medical

factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

> The definition of "disability" under the Idaho workers' compensation law is:
>
> . . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

> when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

48. Claimant argues that since Mr. Crum's vocational report is the only evidence in the record regarding Claimant's permanent disability, the Commission is bound to accept it. *Au contraire.* The determination of disability is a question of fact, which is left to the discretion of the Commission. *Eacret v. Clearwater Forest Industries***,** 136 Idaho 733, 40 P.3d 91 (2002).

> When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts.

Id., 136 Idaho at 737. Mr. Crum's vocational report falls short in each of the respects discussed

in *Eacret*.

Mr. Crum did not review all of the pertinent medical records, including the records of her two treating physicians, Drs. Gibson and Krafft. Inexplicably, he fails to consider the opinions of Drs. Krafft and Gussner, both of whom opined that Claimant could return to her time of injury job. Just as inexplicably, he accepts the opinion of Dr. Bates, who saw Claimant on only three occasions, who was not her treating physician, and who did not review any of Claimant's prior medical records.

Equally important, Mr. Crum apparently overlooked the possibility that Claimant was qualified and competitive for work as a phlebotomist in a setting other than that of her time of injury position. In a clinical setting, patients are ambulatory and not likely to be combative. In such a setting it should be easy for Claimant to utilize good body mechanics and avoid the bending and twisting that might occasionally be necessary in a long-term care situation.

Finally, Mr. Crum makes no mention of Claimant's uninspired work search—certainly a relevant consideration in determining whether any claimant has sustained loss of access to the job market or a loss in earning capacity. Mr. Crum's vocational assessment is not persuasive.

Neither does Claimant's work history or her testimony support a claim for disability. Claimant has been a part-time worker for many years. She chose to work part-time so that she could be home with her young children. Following her husband's deployment to Iraq, it is understandable that Claimant made a decision to stay home full-time. Claimant's choice, however, does not provide a basis for a finding of disability in excess of her impairment.

ATTORNEY FEES

49. Attorney's fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in

Idaho Code § 72-804, which provides:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney's fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The determination that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

50. Claimant has failed to establish any grounds for an award of attorney fees in this proceeding. Medical care was provided until Claimant refused additional care and two physicians determined that she was at maximum medical improvement. She was paid total temporary or total partial disability benefits while she was off work or working limited hours. Defendants promptly paid the impairment rating given by Dr. Gussner, and Claimant has not disputed that impairment rating. The only benefit that Defendants did not pay voluntarily and timely was PPD, which they disputed. The Commission, having found no basis for awarding disability in excess of impairment declines to award attorney fees to Claimant pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant has failed to carry her burden of proving she is entitled to additional medical care or that Defendants failed to provide reasonably necessary care.

2. Claimant has failed to carry her burden of proving she has sustained any disability in excess of her impairment.

3. Claimant is not entitled to an award of attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 5 day of July, 2006.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of July, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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djb /s/_____